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No. 83-515

**In The**

# Supreme Court of the United States

October Term, 1983

KEE JOE BENALLY, et al.,

Petitioners,

v.

UNC RESOURCES, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does this Court have jurisdiction of this petition for certiorari?

2. Did the Tenth Circuit Court of Appeals abuse its discretion in denying leave to file an interlocutory appeal under 28 U.S.C. § 1292(b) (1976)?

3. Will this Court review a federal district court's ruling where the federal action subsequently has been stayed in favor of a parallel state court action in which a substantial state law question still pends?

## PARTIES BELOW

In addition to the petitioners identified in the petition, the other parties to the district court proceedings are UNC Resources, Inc., a Virginia corporation; United Nuclear Corporation, a Delaware corporation; UNC Mining and Milling Services, Inc., a Delaware corporation (hereinafter collectively referred to as UNC)* and Kaiser Engineers, Division of Henry J. Kaiser Company, a Nevada corporation.

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*UNC Mining and Milling Services, Inc., is a wholly owned subsidiary of United Nuclear Corporation, which is a wholly owned subsidiary of UNC Resources, Inc. UNC ATLIS Systems, Inc., and Summit Mortgage Investors are nonwholly-owned subsidiaries or affiliates of UNC Resources, Inc. In addition, UNC Teton Exploration Drilling Company, which is a wholly owned subsidiary of UNC Resources, Inc., holds a 50% ownership interest in Teton Australia Pty., Ltd. and Stelbourne Pty., Ltd., both of which are incorporated in Queensland, Australia. Stelbourne holds a 50% ownership interest in Davies Drilling and Remet Engineers, both of Australia.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## JURISDICTION

We believe that this Court lacks jurisdiction. To avoid duplication, we set out the facts and relevant legal principles as among the reasons for denying the writ.

## STATEMENT OF THE CASE

Petitioners have omitted several material facts from their statement of the case: (1) In 1981 petitioners filed a separate action in state court in New Mexico, adding new parties but

raising the same issues present in the federal district court case, *Adakai, et al. v. UNC Resources, Inc., et al., McKinley County District Court*, No. Civ. 81-163. (2) As did the federal district court, the state court held as a matter of federal preemption that petitioners' claims for punitive damages were barred. The state court's order is Appendix A to this brief. Neither the state court nor the federal court, Pet. at App. 11B, ruled upon respondents' alternative argument that the claim for punitive damages was barred as a matter of state law. (3) On agreement of the parties, the federal district court, on March 7, 1983, stayed the proceedings in this case pending trial of the same claims in the state court action. The district court's order is Appendix B to this brief.

## SUMMARY OF ARGUMENT

The petition is directed to the wrong court and raises the wrong issues. On its face the petition is directed to the Tenth Circuit Court of Appeals. But petitioners ask that a writ issue "to review the interlocutory order of the United States District Court." Pet. at 1. This Court has no jurisdiction to review an interlocutory decision of a district court. The only issue that properly might be raised is whether the Tenth Circuit abused its discretion in denying leave to appeal. Petitioners, however, do not raise this issue nor do they have facts or legal authorities that would support such a claim.

The issue that petitioners have raised is of no practical or legal consequence. The district court proceedings have been abated, and the state court might preclude a punitive damages award on state law grounds. At best a ruling by this Court in petitioners' favor would be an advisory opinion to the state court. That function could be served as well by this Court's decision in *Silkwood v. Kerr-McGee Nuclear Corp.*, No. 81-2159, which recently was argued.

## REASONS FOR DENYING THE WRIT

I. *This Court Has No Jurisdiction.*

This now purports to be a petition for certiorari to the Tenth Circuit Court of Appeals.[1] Petitioners, however, still seek Supreme Court review of an interlocutory district court decision on a question of law. Petitioners cite no statutory basis for such review, and there is none.

If this is to be regarded as truly a petition to the Tenth Circuit Court of Appeals, there is still no jurisdiction. The Court has statutory certiorari jurisdiction over the courts of appeals only as to those cases that are "in" the courts of appeals. 28 U.S.C. § 1254(1) (1976). When, as here, the court of appeals has exercised its discretion to deny leave to file an interlocutory appeal, the case is not "in" the court of appeals at all and therefore the certiorari act does not apply. *See Davis v. Jacobs*, 102 S. Ct. 417, 418 (1981) (opinion of Stevens, J., respecting denial of petitions for writs of certiorari); *id.* at 420 (Rehnquist, J., dissenting).[2]

This Court in any case, has no jurisdiction to review the merits of the district court's determination without first determining that the court of appeals abused its discretion

[1]Petitioners' August 19, 1983 petition, which was not accepted for filing, specifically was directed to the district court. Except for the cover, however, there is little difference between the August petition and the petition currently before the Court.

[2]Nor is there jurisdiction under the All Writs statute. This petition does not purport to lie under the All Writs statute. Furthermore, the All Writs statute is inapplicable in cases of interlocutory review where there is no eventual direct appeal to this Court. *Cf. United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 202, 65 S. Ct. 1120, 89 L. Ed. 1554 (1945) (accepting jurisdiction under All Writs statute of appeal of a district court's interlocutory order only because under the Expediting Act, "sole appellate jurisdiction lies in this Court").

in denying leave to appeal. Petitioners, however, have not raised this issue, and therefore, it is not before this Court. *Namet v. United States*, 373 U.S. 179, 190, 83 S. Ct. 1151, 1157, 10 L. Ed. 2d 278 (1963); Sup. Ct. R. 21.1(a).

II. *The Tenth Circuit Did Not Abuse Its Discretion in Denying Leave to Appeal.*

If the Court decides that it has jurisdiction and that the issue presented is whether the Tenth Circuit Court of Appeals abused its discretion in denying review under 28 U.S.C. § 1292 (1976), the petition nevertheless should be denied. There is no suggestion or evidence in the petition that the Tenth Circuit abused its discretion, nor could such a claim be made successfully. As Wright, Miller, and Cooper have observed, 17 *Federal Practice & Procedure* § 4036, at 13 n.18 (1978) "the discretion to deny interlocutory appeal under 28 U.S.C.A. § 1292(b), . . . is so broad that Supreme Court reversal should never be available."

III. *There Are No "Special and Important Reasons" for Granting the Writ: the Federal Case is Moot and the State Court May Decide This Question on State Law Grounds.*

Petitioners' sole argument for issuance of a writ is that the district court's ruling conflicts with federal preemption principles recognized by this Court. Pet. at 10. Their concerns, however, are with the safety of radioactive waste material and they argue that allowing punitive damages supplements the federal scheme in this area. Pet. at 13, 21. Thus, the district court was correct: The punitive damages claims are preempted because "the federal government has occupied the entire field of nuclear safety concerns, except for the limited powers expressly ceded to the states." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1717, 1726 (1983).

A more serious failing in the petition is that whether a conflict exists is of academic interest only. The federal case has been stayed and abated. The state court now has the matter. If *Silkwood* is reversed, the state court will rule upon respondents' alternative argument that New Mexico state law precludes an award of punitive damages under the circumstances of this case. Regardless of the outcome, there will then be no federal preemption issue in the case. Therefore, the writ should be denied. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 77, 75 S. Ct. 614, 618, 99 L. Ed. 897 (1955) ("we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute"); *cf. id.*, 349 U.S. at 74, 75 S. Ct. at 616 (" '[s]pecial and important reasons' imply a reach to a problem beyond the academic . . .").

As the foregoing demonstrates, under the best of circumstances any review by this Court would serve merely as an advisory opinion to the state court. Assuming *arguendo* that there is a need for an advisory opinion, that need will be satisfied by this Court's decision in *Silkwood, supra*. Petitioners concede that this case "presents the same *general* issue as in *Silkwood*." Pet. at 10 (emphasis in original). But they argue that the writ should be granted because New Mexico's "Agreement State" status[3] raises an issue not present in *Silkwood*. *Id.* at 11. Even if this were a new issue, that issue properly can come here, if ever, by certiorari to the state supreme court. 28 U.S.C. § 1257 (1976).

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[3]New Mexico has assumed regulatory authority over uranium mill tailings pursuant to an agreement with the Nuclear Regulatory Commission, as authorized by section 274 of the Atomic Energy Act, 42 U.S.C. § 2021 (1976).

As the district court correctly held, however, New Mexico's Agreement State status is not a basis for distinguishing the Tenth Circuit's decision in *Silkwood*. *See Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1149-50 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). And, contrary to petitioners' assertions, the 1978 Uranium Mill Tailings Radiation Control Act ("UMTRCA"), 42 U.S.C.A. §§ 7901-7942 (West 1983), supports the district court's ruling. The legislative history of UMTRCA shows that the general intent was to insure "that mills located in a nonagreement state are not subject to different requirements than their competitors which are located in an agreement state." H.R. Rep. No. 95-1480, 95th Cong., 2d Sess. 45, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7433, 7472.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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**APPENDIX A**

STATE OF NEW MEXICO COUNTY OF MCKINLEY
IN THE DISTRICT COURT

FRED ADAKAI, *et al.*,
Plaintiffs, (Filed: Nov. 28, 1982)

vs. No. CV-81-163

UNC RESOURCES, INC.,
*et al.*,

Defendants.

ORDER AND JUDGMENT

The above cause having come before the Court on the Motions of Kaiser Engineers, Division of Henry J. Kaiser Co. ("Kaiser"), and UNC Resources, Inc., United Nuclear Corporation, and UNC Mining & Milling Services, Inc. ("UNC") for partial summary judgment on the issue of punitive damages, and the Court having considered the record, submissions of the parties, and having heard oral argument, and being otherwise fully advised in the premises, and being of the opinion that the motions of Kaiser and UNC are well taken and should be granted on the ground that the Plaintiff's claims for punitive damages are barred as a matter of federal preemption, it is therefore,

ORDERED, ADJUDGED AND DECREED:

1. That Defendants UNC's and Kaiser's Motions for Partial Summary Judgment on the issue of punitive damages are granted;

2. That Defendants Kaiser and UNC are entitled to judgment on the issue of Plaintiffs' claims for punitive damages as a matter of law;

3. That judgment is hereby entered dismissing all punitive damage claims against Kaiser and UNC.

DATED this ____ day of _____, 1982.

/s/ Louis E. DePauli
District Court Judge

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNC RESOURCES, INC.,
a Virginia corporation, *et al.*,

Plaintiffs,
Counterdefendants,

-vs-

(Filed: Mar. 7, 1983)

KEE JOE BENALLY, *et al.*, CIVIL NO. 80-750-HB

Defendants,
Counterclaimant,

and

JACK ADAKAI, *et al.*,

Defendant Intervenors,
Counterclaimants.

-vs-

KAISER ENGINEERS, DIVISION
OF HENRY J. KAISER COMPANY,
a Nevada corporation,

Defendant on Counterclaims.

O R D E R

The parties having agreed that the above cause should be stayed and abated until the trial of the same claims in the District Court of McKinley County, New Mexico; Now, Therefore,

IT IS ORDERED that the above action is stayed and abated until the trial of the same claims in the District Court of McKinley County, New Mexico.

/s/
UNITED STATES DISTRICT JUDGE